NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Fred Meyer Stores, Inc. and United Food and Commercial Workers Local 1439, affiliated with United Food and Commercial Workers International Union. Case 19–CA–31994

September 30, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on July 6, 2009, the General Counsel issued the complaint on July 27, 2009, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 19-RC-15068. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On August 17, 2009, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On August 19, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response. The General Counsel filed a reply to the Respondent's response.

Ruling on Motion for Summary Judgment¹

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its argument that the two-member Board lacked the statutory authority to issue its Order denying the Respondent's request for review of the Regional Director's decision and direction of election in the underlying representation proceeding.²

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed U.S.L.W. (U.S. September 11, 2009) (No. 09-328); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009), petition for cert. filed sub nom. NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc., U.S.L.W. (U.S. September 29, 2009) (No. 09-377).

The Respondent asserts in its response that it could not have previously raised its objection to the Board's authority to issue a decision in the representation proceeding, and that therefore the issue is properly raised at this time and can be litigated in this unfair labor practice proceeding. Further, in its answer, the Respondent states that it intends to preserve the arguments it raised in the representation proceeding until the status of the two-member Board is conclusively determined. We find no merit in the procedural aspect of the Respondent's argument because nothing precluded the Respondent from raising this issue in the representation proceedings. In addition, the substantive aspect of its argument is without merit for the reasons set forth in fn. 1.

In addition, the Respondent's answer specifically denies pars. 6(b), (c), and 7 of the complaint, which allege that the Union was certified as the exclusive collective-bargaining representative of the voting group of nutrition department employees and sets forth the appropriate unit. The unit issue, however, was litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent's denials with respect to these allegations do not raise any litigable issues in this proceeding. See *Alta Vista Regional Hospital*, 352 NLRB 809, 809 fn. 3 (2008).

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Ohio corporation with an office and place of business in Spokane, Washington, has been engaged in the retail grocery business.⁴

During the 12-month period preceding issuance of the complaint, a representative period, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000, and purchased and received at its Spokane, Washington facility goods valued in excess of \$50,000 directly from points outside the State of Washington.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, United Food and Commercial Workers Local 1439, affiliated with United Food and Commercial Workers International Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington; excluding all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

Since at least 1995, and at all material times, based on Section 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the unit and, since then, has been recognized as such by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from January 2, 2005, to January 5, 2008, and extended by agreement of the parties.

About April 24, 2009, in Case 19–RC–15068, a majority of all regular full-time and part-time employees working in the nutrition department at the Respondent's Francis Avenue, Spokane, Washington retail store, in a self-determination election, designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent, to be included in the unit.

About May 7, 2009, in Case 19–RC–15068, the Union was certified as the exclusive collective-bargaining representative of the voting group of nutrition-department employees described above.⁵

The following employees of the Respondent (the expanded unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington, and all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave., Spokane, Washington, re-

³ The Respondent's motion to dismiss the complaint, its request for a hearing before an administrative law judge, and its request for oral argument are therefore denied.

Member Schaumber concurred in denying the Respondent's request for review in the underlying preelection representation proceeding (unpublished order dated April 21, 2009). In so doing, he recognized that although he dissented in *Umass Memorial Medical Center*, 349 NLRB 369 (2007), that case is extant law. Member Schaumber remains of the view he expressed in *Umass Memorial Medical Center*. Nevertheless, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra. In light of this, and for institutional reasons, Member Schaumber agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

⁴ In its answer, the Respondent denied par. 2(a) of the complaint, which alleged that it was a State of Delaware corporation, but admitted that it is a State of Ohio corporation. In the memorandum in support of his motion, the General Counsel acknowledged that Respondent is a State of Ohio corporation.

⁵ Although the complaint alleges that the certification issued on May 7, 2009, certified the Union as exclusive representative of the entire unit, including the voting group, this is an incorrect statement of the results of the election. The representation proceeding involved a self-determination election among the voting group and the certification simply certified that the Union may bargain for the employees in the voting group as part of the unit of employees it currently represents. See *Winkie Mfg. Co.*, 338 NLRB 787, 787 fn. 2, enfd. 348 F.3d 254 (7th Cir. 2003).

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tail store; excluding the nutrition department manager of the Francis Ave., Spokane, Washington, retail store, all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collectivebargaining representative of the employees in the expanded unit under Section 9(a) of the Act.

B. Refusal to Bargain

About May 28, and June 19, 2009, the Union requested, in writing, that the Respondent bargain with it as the exclusive collective-bargaining representative of the nutrition department employees at its Francis Avenue store. About June 26, 2009, the Respondent, in writing, informed the Union that it would not bargain with it as the exclusive bargaining representative of the nutrition department employees at its Francis Avenue store. We find that this failure and refusal constitutes an unlawful failure and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing since about June 26, 2009, to bargain with the Union as the exclusive collective-bargaining representative of employees in the nutrition department of its Francis Avenue store, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.⁶

ORDER

The National Labor Relations Board orders that the Respondent, Fred Meyer Stores, Inc., Spokane, Washington, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to recognize and bargain with United Food and Commercial Workers Local 1439, affiliated with United Food and Commercial Workers International Union, as the exclusive bargaining representa-

tive of the employees employed by the Respondent in the nutrition department of its Francis Avenue store.

- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive representative of the employees employed by the Respondent in the nutrition department of its Francis Avenue store as part of the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington, and all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave., Spokane, Washington, retail store; excluding the nutrition department manager of the Francis Ave., Spokane, Washington, retail store, all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

- (b) Within 14 days after service by the Region, post at its Francis Avenue facility in Spokane, Washington, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 26, 2009.
- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

⁶ In his Motion for Summary Judgment, the General Counsel included a proposed order that implicitly requested a remedy under *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). We find that such a remedy would be inappropriate in this case because the underlying representation proceeding involved a self-determination election. See *Winkie Mfg. Co.*, supra at 788 fn. 3; *Edward J. DeBartolo Corp.*, 315 NLRB 1170, 1171 fn. 3 (1994).

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Food and Commercial Workers Local 1439, affiliated with United Food and Commercial Workers International Union, as the exclusive bargaining representative of our employees in the nutrition department of our Francis Avenue store.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the nutrition department of our Francis Avenue store as part of the following bargaining unit:

All grocery employees working for us at our Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington, and all regular full-time and part-time employees working in the nutrition department at our Francis Ave., Spokane, Washington, retail store; excluding the nutrition department manager of the Francis Ave., Spokane, Washington, retail store, all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

FRED MEYER STORES, INC.